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BEFORE THE

Federal Communications Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of)

Amendment to the Commission's)
Rules Regarding a Plan for Sharing)
The Costs of Microwave Relocation)

WT Docket No. 95-157

To: The Commission

**REPLY COMMENTS
OF
KELLER AND HECKMAN**

The law firm of Keller and Heckman, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits these Reply Comments responsive to Comments filed in this proceeding by the Personal Communications Industry Association (PCIA) and the Cellular Telecommunications Industry Association (CTIA), two PCS trade associations. Inasmuch as CTIA and PCIA have singled-out our firm as the target of their unfounded allegations of "abusive" tactics by microwave licensees during the relocation negotiations, we appreciate this opportunity to submit these Reply Comments.

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I. PRELIMINARY STATEMENT

1. Keller and Heckman represents numerous licensees that are authorized by the Commission to operate point-to-point microwave systems in the Private Operational-Fixed Microwave Service ("POFS") on assignments in the frequency band 1850-1990 MHz. These licensees utilize their POFS systems to serve a variety of vital point-to-point telecommunications requirements. They are directly affected by the Commission's rules, adopted in Gen. Docket 90-314 and ET Docket 92-9, that led to the reallocation of spectrum in the 2 GHz range for emerging technologies. For the same reason, they are affected by the cost-sharing and other proposals in the instant proceeding. During the course of our representation, we regularly advise microwave incumbents concerning their rights and obligations under the Commission's PCS/microwave relocation rules.

II. REPLY COMMENTS

A. Microwave Incumbents are not Abusing the Process.

1. CTIA would have the Commission believe that anyone not willing to accede to PCS demands during the Voluntary Negotiation Period is a "bad faith" negotiator, a "bad actor," an extortionist or an FCC rule violator. PCIA also claims that incumbents have egregiously "abused" the relocation process, citing a consulting contract between the City of San Diego and Keller and Heckman, as well as the

Spring/Summer 1995 edition of the Keller and Heckman Telecommunications Newsletter. PCIA at 6-7, Exhibit B.

2. Despite all of their bluster, these two PCS trade associations have not identified any FCC rules that have been "violated" or "abused" by incumbents. Nor have they pointed to any advice by Keller and Heckman, whether through its Newsletter or elsewhere, which is untrue, inaccurate or inconsistent with the Commission's rules in any way.

3. Keller and Heckman urges the Commission to look behind the PCS industry's campaign of misinformation. Attached as Exhibit A is a readable copy of the Keller and Heckman Spring/Summer 1995 Telecommunications Newsletter (the version attached to the PCIA Comments is illegible). A second Keller and Heckman publication, "Answering the Big Lie: Straight Talk on Microwave Relocation" also is attached hereto as Exhibit B. These two documents are indicative of the type of advice we have given to our clients concerning the nature and requirements of the Commission's relocation rules.

4. Keller and Heckman invites the Commission and all other interested parties to scrutinize these Exhibits closely; the advice contained therein is entirely forthright and appropriate. We stand by every word.

5. For example, the Newsletter correctly notes that the voluntary period is not about "comparable facilities;" rather, it is "about the early and voluntary departure of the microwave incumbents from the 2 GHz band." Exhibit A at 1, 3. The Newsletter then advises incumbents that:

During the voluntary relocation period, microwave incumbents are free to negotiate whatever terms and conditions they believe are appropriate under the circumstances. Exhibit A at 1.

6. This advice -- which reflects our view of the voluntary negotiations -- is unquestionably accurate and correct. In fact, the Commission recently reaffirmed this position, stating that the relocation rules enable a PCS licensee to offer "premium payments or superior facilities (during the voluntary negotiation period) as an incentive to the incumbent to relocate quickly." Notice at ¶ 6.

7. The Newsletter also points out that only ten days after the commencement of the voluntary negotiation period, PCIA wrote a letter to Chairman Hundt seeking to change the ground rules for the relocation and protesting that incumbents would extract "excessive payments" from PCS auction winners during the voluntary negotiation phase. Newsletter at 1. Based upon 10 days "experience" with the negotiations, PCIA asked the Commission to eliminate the voluntary negotiation period altogether. Newsletter at 1. PCIA also demanded that the Commission cap the allowable compensation and forbid restoration of incumbents to their 2 GHz facilities in the event that the replacement system proves to be inadequate. Newsletter at 1.

8. Clearly, 10 days of negotiation is insufficient for PCIA or anyone else to determine that the relocation rules were being "abused" by incumbents. In fact, through PCIA's letter to Chairman Hundt, the PCS industry was simply seeking to

gain unfair negotiating leverage by launching a well-prepared, preemptive campaign of misinformation and false accusations.

9. Exhibit B is similarly forthright and accurate. For example, it informs incumbents that the PCS licensee, not the incumbent microwave user, is positioned to dictate the actual timing of the negotiations, and that only the PCS licensee has the right to initiate mandatory negotiations. Exhibit B at 2. Because of the inherent leverage of the PCS industry, incumbents have a clear incentive to negotiate fairly during the relocation transition process. Exhibit B at 2. In fact, based on our experience, virtually every microwave licensee that has been contacted by a PCS licensee has attempted in good faith to negotiate a voluntary relocation.

10. Exhibit B also refutes the PCS industry's claim that abusive tactics by incumbents have prevented the rapid deployment of PCS. Exhibit B at 3. Exhibit B explains how the relocation process was crafted to promote compromise and incentives in order to allow early implementation of PCS while at the same time protecting the legitimate and quantifiable needs of incumbents. Exhibit B at 3.

11. Exhibit B points out that some PCS companies apparently have refused to initiate negotiations for fear of setting an undesirable precedent that would acknowledge the rights of incumbents to negotiate the terms of their systems' relocation. Exhibit B at 4. Exhibit B also illustrates how the PCS trade associations have exerted enormous pressure on PCS licensees not to "break ranks" and deal fairly and openly with incumbents. Exhibit B at 4.

12. Without this type of advice, microwave incumbents might easily fall prey to the strong-arm tactics of some elements in the PCS industry. Far from abusing the process, Keller and Heckman and other consultants have been providing incumbents with necessary information about complex rules to enable them to negotiate fairly. Our advice, in fact, has been consistent with the Commission's rules in all respects.

B. The Relocation Rules are Working.

13. The Commission has now reaffirmed that a request by a microwave incumbent for more than "comparable facilities" during the voluntary negotiation period is perfectly permissible. Notice at ¶ 6. Yet some PCS entities persist in portraying incumbents as "bad actors" and "profiteers" if an incentive is sought. Some even put forth the absurd notion that large corporations such as AT&T, Sprint and BellSouth need a "ski mask" for protection from "reprisals" by microwave incumbents. CTIA at 8, n. 13, Exhibit I. This is nothing more than a concerted effort to undermine the regulations after-the-fact.

14. The A and B block PCS entities are sophisticated corporations; they contributed to, and were fully aware of, the formation of the relocation rules well before they participated in the PCS auctions. The fact that these leading telecommunications companies paid over \$7.7 billion dollars in the first PCS auction evidences their presumed knowledge of applicable rules.

15. What has changed in the regulatory picture since PCS licensees received their licenses in April 1995? Nothing. In fact, relocation is progressing as planned. PCS licensees are in the process of testing their systems. Some have successfully cleared the band early: marketplace proof that the Commission's rules are well crafted to accomplish this difficult transition.

C. Voluntary Negotiations Should Remain Truly Voluntary.

16. PCS licensees ignore the fact that, under the Commission's rules, incumbents are not required to negotiate during the voluntary period. If incumbents do decide to negotiate during the voluntary negotiation period, the Commission has made it clear that incumbents are entitled to request premiums and incentives in exchange for their early relocation. Notice at ¶ 6.

17. Nevertheless, PCS licensees seek to force incumbents to negotiate now or be penalized later. For example, PacBell and Western Wireless urge the Commission to require incumbents to negotiate during the voluntary period -- and only for "comparable facilities." If such "negotiations" are unsuccessful, then PacBell and Western Wireless demand that the Commission penalize incumbents during the ensuing mandatory period by furnishing incumbents with only the depreciated value of equipment, thereby requiring the incumbent -- not the cost causing PCS licensee -- to pay for state-of-the-art replacements. PacBell at 8; Western Wireless at 1. Another PCS entity, Iowa L.P. 136, even suggests that no reimbursement be paid at any time. Iowa L.P. 136 at 6. CTIA asserts that those incumbents who do not reach agreement

during the voluntary negotiation period should pay all of their own relocation costs during the involuntary period, providing PCS licensees with an absolutely free ride on the back of the microwave community. CTIA at 9.

18. In no sense can such suggestions be considered "good faith." Good faith means dealing in a straightforward, open manner pursuant to the FCC's established rules. Those rules permit microwave incumbents to choose not to enter into negotiations for a period of two years (three years for public safety). This timeframe was established after years of PCS rulemaking proceedings, ET Docket 92-9.

19. The transition to another band or other technologies is disruptive, expensive and time consuming. Incumbents need to be able to forestall the relocation if their own internal commitments require them to do so. They should not be forced to choose between negotiating now or funding their own relocation later. If their choice is to decline to negotiate now, PCS licensees should be free to urge them to reconsider without the inducement being viewed as some form of extortion or bribery.

III. CONCLUSION

The Commission's decision to reallocate the 2 GHz band from POFS to PCS recognized the legitimate interests of both sides of this issue. The resulting transition is an unprecedented and difficult task. The Commission correctly determined that the best relocation framework would be one based on negotiations with time phases designed ultimately to force resolution if the matter is not resolved voluntarily. Those

who advise each side -- within the context of the Commission's rules -- are playing an appropriate role in this regulatory setting. The only abuse during this process is by those who seek to up-end it to gain an unfair advantage. The Commission should be aware of just such a play by the PCS trade associations. It has the potential to do great damage.

WHEREFORE, THE PREMISES CONSIDERED, Keller and Heckman respectfully urges the Commission to act in accordance with the views expressed herein.

Respectfully submitted,

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Dated: January 11, 1996

Attachments

"Answering the Big Lie"

Straight Talk on Microwave System Relocation

Recently, two trade associations, the Cellular Telephone Industry Association (CTIA) and the Personal Communications Industry Association (PCIA) have been striving to outdo each other in a life-or-death struggle to determine which association will emerge as the representative of the PCS (Personal Communications Services) industry. Their common target has been America's lifeblood industries and institutions: electric, gas and water utilities; natural gas pipeline companies; petroleum pipeline companies; railroads; and state and local governments.

Why? Because these industries and institutions rely on extensive networks of microwave radio facilities to control and coordinate the safe and efficient operations of their core activities: the distribution of vital industrial products or the preservation of life and property. Some of these microwave networks use radio frequencies that the FCC has decided to convert for use by PCS systems.

PCS licensees paid the FCC \$7.7 billion for the right to use these radio frequencies. They did so knowing that the frequencies were currently in use by thousands of microwave licensees, knowing that they would be required to finance the continuing ability of the thousands of industries and institutions to control their ongoing operations by alternate means, and knowing that they would have to guarantee the satisfactory performance of the replacement facilities.

The FCC acknowledged that the transition had the potential to be enormously disruptive to the nation's industrial and public safety functions that were coordinated and controlled by these microwave systems. It therefore established flexible rules to govern the transition. One feature of these transition rules is a negotiating period: three years, in the case of microwave systems that are used by industry, and five years, in the case of microwave systems that are used by public safety agencies.

The negotiation periods have been underway for six months. Although we are in a voluntary phase, where the incumbent microwave licensees do not even have to come to the bargaining table, virtually all microwave incumbents have accommodated the requests of the PCS companies to begin the dialogue.

In response to these invitations to negotiate, the microwave incumbents are --- surprise --- negotiating! Some may even be said to be driving hard bargains. This has created the dream scenario for the PCS trade associations: it has created a dragon to slay for the benefit of the entire PCS industry. Whichever trade association can take more credit for slaying the dragon will have the greater credibility with the PCS industry.

There is little credit, however, in slaying a harmless dragon. So the dragon must be pumped up and made to appear truly vicious, formidable and a danger to all things right and good. Hence the need for the Big Lie. Hence the need for CTIA and PCIA to cast America's bedrock utilities, energy companies and public safety agencies as avaricious impediments to the country's wireless destiny.

CTIA and PCIA have solicited the FCC, the Office of Management and Budget, the Antitrust Division of the Department of Justice and the Congress to come to the PCS industry's rescue. It is a Big Lie and it is time to clear the air.

The Big Lie: "Microwave incumbents have no incentive to negotiate and PCS licensees have no leverage in the transition process."

The Truth: PCS licensees hold the upper hand and the ultimate trump card in the transition process; microwave licensees are at the mercy of the PCS industry.

Fact: An A- B- or C-Block PCS license is 30 MHz wide, an amount equal to five times the size of a broadcast television license. This was done to give the PCS licensee the maximum ability to work around incumbent microwave systems *without having to relocate those systems*.

Fact: The incumbent microwave licensee can never demand negotiations with the PCS licensee. However, the PCS licensee has the sole right to initiate mandatory negotiations with an incumbent microwave licensee and the incumbent cannot refuse a PCS licensee's demand to negotiate.

Fact: Regardless of the microwave incumbent's desires, the PCS licensee has the ultimate right to relocate the incumbent's operations on an involuntary basis.

Fact: Section 1033(j) of the Internal Revenue Code, which provides favorable tax treatment for transactions which implement the microwave transition, is not available to microwave incumbents unless they reach an agreement with the PCS licensee before the end of the prescribed negotiating period.

The Big Lie: "Abusive tactics by microwave incumbents stand in the way of rapid deployment of PCS."

The Truth: PCS licensees have the encouragement of the FCC to present attractive offers to microwave incumbents and several have already done so, resulting in the immediate clearing of the band in their area.

Fact: The FCC has established a transition framework which gives both sides a great deal of flexibility to resolve issues without recourse to the agency. For example, it has enabled the parties to craft private remedies for such vexing issues as the "free rider" problem and the "cherry-picking" problem, both of which stem from the fact that only 2 of the 6 PCS license blocks have as yet been auctioned.

Fact: Replacing some or all of a microwave system can be extremely disruptive and resource intensive. These systems have been put in place over a period of 20 years or more. Some systems that support pipeline or railroad operations may extend for thousands of miles. It is no simple matter to replace them, or parts of them, while at the same time maintaining total communications reliability. Most microwave incumbents would prefer to postpone dealing with this problem for as long as possible.

Realizing this, the FCC encouraged PCS licensees to offer incentives such as upgraded systems to microwave incumbents as an inducement to come to terms quickly with PCS licensees. The fact that an incumbent microwave licensee may not wish to deal with the problem without such an inducement is not an abuse of the process. It simply reflects the burdensome nature of replacing an extensive communications backbone.

Fact: PCS deployment is not imminent. PCS licensees have many hurdles to overcome and microwave system relocation is just one of them. An even larger and potentially more expensive chore for PCS licensees will be the acquisition of base station sites. In addition, the choice of hardware technology has yet to be made by several PCS licensees. One of the more attractive technology choices has yet to be field-proven, much less manufactured in production quantities. Even if all microwave systems were relocated tomorrow, PCS deployment would be only a little closer.

Fact: Several microwave system relocation deals have already been made and closed. Some PCS companies, however, (and we suspect it is only one or two) have made the microwave system relocation issue a *cause celebre*, refusing to negotiate under the present ground rules for fear of "setting a precedent" that would acknowledge the rights of incumbent microwave licensees to negotiate the terms of their systems' relocation.

Through their trade associations, these companies have exerted enormous pressure on the PCS industry not to "break ranks" and deal with the incumbents. This concerted effort by the industry is anticompetitive in effect because it inhibits the more nimble PCS companies from getting to market ahead of the others. **Indeed, there is conduct here that warrants the attention of the Antitrust Division of the Department of Justice, but it is not the conduct of the microwave incumbents.**

The Big Lie: "The value of yet-to-be-auctioned PCS spectrum will be lowered significantly if PCS licensees are forced to comply with the present transition rules."

The Truth: A- and B-Block PCS auction winners will enjoy a windfall at the expense of the U.S. Treasury if the transition rules are changed now. The real threat to the value of future auctions lies in signalling a willingness to change the rules after the fact.

Fact: The transition rules were known to all before the first broadband PCS auction was held. Bidders with a finite amount of resources knew they had to allocate funds to cover three major categories of expenses: the cost of the license, the cost of microwave system relocation and the cost of infrastructure. The purpose of the PCS industry's present campaign is to reduce, after the fact, one of these expenses, the cost of microwave

system relocation. Since the cost of infrastructure must be a constant in their budgeting process, the inescapable conclusion is that the money they now seek to save is money that would have been available for the other expense, cost of the license. This is money the U.S. Treasury would have had, but for the bidders' need to fund microwave system relocation.

Fact: For the auction process to work, bidders must have full knowledge of the ground rules and absolute confidence that these rules will not change. The FCC experienced defaults in earlier, trial-run auctions for IVDS licenses because some bidders thought they could come in later and change the ground rules.

The FCC has already auctioned off the "crown jewels" in its inventory: the 30-MHz, MTA-size, A- and B-Block PCS licenses. Because the FCC stoutly refused to change the ground rules for its earlier auctions, there were no defaults in this auction. If the ground rules are changed now as urged by CTIA and PCIA, the winners of these licenses will receive a windfall and it is safe to predict that the FCC will see a return to defaults in future auctions as a result of future bidders' schemes to change the rules after the fact.

There Is a Win-Win Solution

Microwave system transition is an enormous problem for both sides and it is not surprising that one side would be trying to gain complete advantage over the other. These efforts, however, are misguided and short-sighted. They are calculated to produce a win-lose result.

The better approach would be to acknowledge the fact that many of the microwave incumbents have assets that are not subject to the transition rules, but which could be of value to the PCS industry. For example, acquisition of base station sites will be a major problem for the PCS industry. If the PCS industry is upset with microwave incumbents, wait until they come up against the unregulated companies that have quietly acquired the rights to every rooftop in every major city in America for the specific purpose of negotiating with PCS licensees.

Many microwave incumbents have or control advantageous communications sites. Many also have rights of way, easements, conduits, towers, buildings and other assets that could be useful in a PCS system. Many incumbents are in a position to

invest in PCS ventures, as has already occurred in Texas. Many incumbents, especially utilities, already have customer relationships with every potential PCS subscriber in an MTA or BTA.

In short, the smarter approach from the business point of view, would be for the PCS licensees to accept the microwave incumbents as they are and encourage them or even give them a meaningful incentive to come to the bargaining table. FCC regulations do not limit the scope of these negotiations. This is fertile ground on which many mutually advantageous deals can take root.

Depriving microwave incumbents of their negotiating rights would drive every incumbent to the endgame: involuntary relocation, where the PCS licensee must actually build and tender to the microwave incumbent a fully-functional and comparably working system. Such an approach not only forecloses the PCS industry's early access to the many other favorable assets owned by the incumbents but creates a truly formidable bargaining opponent when the PCS industry seeks the use of these assets through deals with the incumbents in the future.

Clearly, then, the win-win solution is already at hand. The win-win solution is the one crafted by the FCC that was already starting to work before the two trade associations began thrashing about. CTIA and PCIA need to step aside and let the business interests of their members come to the fore.

Telecommunications Advisory

Spring/Summer 1994

KELLER AND HECKMAN

INSIGHT AND COMMENTARY

FEATURE STORY

Two GHz Microwave Relocation: Complex Negotiations Ahead

If your company has microwave facilities that operate in the 2 gigahertz (GHz) band, you may soon be approached by one or more prospective licensees of broadband Personal Communications Services (PCSs). In advance of PCS license auctions by the Federal Communications Commission (FCC), prospective bidders already are seeking to enter into option agreements with the microwave licensees that they will eventually displace.

The FCC has decided to convert the use of the 2 GHz band from point-to-point microwave systems to PCSs. Very soon, under rules recently adopted by the FCC, incumbent microwave licensees will be required to negotiate with PCS licensees to replace their 2 GHz links with "comparable facilities." But those incumbent microwave licensees who formulate their relocation strategies early can turn this potentially disruptive process into a beneficial opportunity.

FCC rules require PCS providers to preserve the integrity of an incumbent's existing operations or to cover the cost of moving the incumbent to alternate facilities. In

relocating an incumbent, the PCS provider must:

- Pay all costs of relocating the incumbent to a comparable facility;
- Build and test the new system; and
- Cover the cost of removing or dismantling existing facilities.

The incumbent is not required to relocate until the alternative, comparable facilities are in place and until a seamless handoff can be ensured. Most importantly, if within one year after the relocation the incumbent demonstrates that the new facilities are not comparable in performance to its former facilities, the PCS provider must remedy the defects or pay to relocate the incumbent back to the 2 GHz band.

While these general requirements are straightforward enough, there are gaps in them that guarantee that the actual relocation process will be quite complicated. For example, the FCC's rules leave it to the parties to define the facilities to be

(continued on page 2)

In this issue, a special focus on wireless telecommunications.

Two GHz Microwave Relocation: Complex Negotiations Ahead

Licensees of point-to-point microwave systems in the 2 GHz band will soon be required to negotiate with the winners of upcoming auctions for licenses to provide Personal Communications Services. Feature story.

The Market for Emerging Telecommunications Technologies

For perspective on how and why the FCC is uprooting tens of thousands of microwave systems to make room for Personal Communications Services, see page 3.

FCC Turns to Spectrum Auctions to Select Wireless Licensees

The exclusive licenses for Personal Communications Services and other commercial communications services will be distributed by auction. For an overview, see page 4.

Near Term Business Opportunities in PCS

How can you get in on the action? See page 5.

(continued from page 1)

replaced; their capabilities; what the criteria are for comparable facilities; and the standards for determining when the replacement facilities have failed to perform.

Relocation will be especially complicated for licensees of large systems. All incumbents have a singular goal -- the smooth transition to alternate facilities -- but large licensees may be forced to deal with numerous PCS providers with a variety of PCS implementation plans.

The relocation process will be further complicated by the fact that PCS providers are not compelled to relocate incumbents in any particular timeframe. PCS providers can opt to work around existing microwave stations, and they can choose to stagger their relocation efforts as they see fit. PCS providers also are likely to attempt to persuade incumbents to modify their microwave systems to limit interference potential. In short, incumbents will encounter significant points for negotiation. PCS providers can be expected to use the ambiguities in the rules to their advantage.

But incumbents who develop a proactive relocation strategy are not without their own leverage. Potential PCS providers are anxious to enter the exploding market for wireless communications. With existing wireless carriers, such as cellular and Specialized Mobile Radio (SMR) operators, already moving to take advantage of this demand, potential PCS players fear they will be shut out of the market if they do not soon initiate service.

Potential PCS providers are also anxious to lock in the cost of the relocation of the incumbent microwave system so that they will know better how much money they can bid at auction. The proactive incumbent, with

a carefully crafted relocation strategy, is therefore likely to find the PCS provider receptive to a plan that can be implemented quickly at a price certain, even if the financial terms are less advantageous than the PCS provider would have negotiated later in the process. This is only possible, however, if the incumbent is prepared to take the initiative. ♦

Keller and Heckman was founded as a telecommunications law firm in 1962. Since then, our practice has expanded in step with the industry's tremendous growth.

We currently represent Fortune 500 companies, large utilities, common carriers, and governmental entities that operate extensive point-to-point microwave systems in the 2 GHz band. Building on that knowledge, we have identified the most critical issues which incumbents must address in relocation negotiations and would be pleased to review those issues with you at any time.

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PERSPECTIVE

The Market for Emerging Telecommunications Technologies

It is extremely rare for the Federal Communications Commission (FCC) to direct existing licensees to vacate spectrum in order to make way for an entirely different technology and class of service. Yet that is exactly what the FCC has done in a region of the spectrum known as the 2 gigahertz (GHz) band.

For years, the 2 GHz band has been extensively used for point-to-point microwave communications systems. These systems are like invisible wires in the sky that connect one point to another. They can be used in much the same way as wire line facilities.

Such systems are extremely versatile and, therefore, extremely popular. There are tens of thousands of licensees in the 2 GHz band. Under new rules recently adopted by the FCC, however, these licensees must find alternative ways to meet their communications needs. The band is being cleared in order to provide the spectrum resource to support something totally new and completely different from point-to-point microwave systems.

That new and different technology generally goes by the three-letter term "PCS." PCS stands for "Personal Communications Services." There is no firm definition of a Personal Communications Service, but the key element in the term is the word "personal." The concept connotes small, wireless, communications devices that can be carried --- or even worn --- by individuals as they move about.

PCS promises to be the ultimate in communications mobility. PCS is Dick Tracy's two-way wrist radio come to life, along with devices and applications that Chester Gould never imagined:

personal digital assistants; palm-sized computers, printers and fax machines; wireless computer networks; and wireless PBXs, to name a few. In short, PCSs promise the capability to carry voice, data and images from one person to another, wherever either of them might be at the time. If these services are priced within reach of the consumer market, it is safe to say that the market for PCSs will be enormous.

The reason the FCC had to clear a band to make room for PCS is that all of the currently useable electromagnetic spectrum is already allocated for some specific kind of use. For instance, some bands are designated for use by radio and television broadcast stations. Other bands are designated for use by cellular radiotelephone systems. Still other bands are designated for use by police radio dispatch systems. When the new PCS concept came along, there simply was no vacant or unallocated spectrum available for the service.

Not every new technology justifies a spectrum reallocation. The regulatory landscape is littered with technologies that did not survive for lack of spectrum on which to develop. However, in the case of PCS, the regulators were convinced that, on balance, the promised benefits of the new services stood to outweigh the cost of relocating microwave incumbents in the 2 GHz band.

Besides the communications benefits, Congress saw in PCS a way to raise billions of dollars in non-tax revenues through the

auction of PCS licenses. PCSs will be, for the most part, commercial services that will be offered to subscribers, much like cellular radiotelephone services are marketed today. Accordingly, the reasoning goes, prospective PCS licensees will be willing to compete for their licenses at auction and to bear the cost of relocating the microwave incumbents who are presently using the 2 GHz band, since PCS licensees will ultimately recover these costs many times over in the lucrative marketplace of wireless communications.

There are good reasons for such optimism. To find them, one need look no further than two currently-existing forms of wireless communications. The first is cordless telephones. These wireless, battery-powered telephone handsets can be carried around the house and yard, permitting the users to make and receive telephone calls unrestrained by the length of a cord. Some 20 million cordless telephone sets are sold in the United States each year, generating hardware sales of more than \$1 billion per year. Approximately 46% of all U.S. households have a cordless telephone. Clearly the public loves the increased mobility that these devices afford.

The second is cellular telephones. Despite the fact that, unlike cordless telephones, there is a charge for cellular connect time, the industry has consistently exceeded growth projections. In 1988, there were just over 2 million units in use. A subscriber's average monthly bill

(See "Mobility," continued on page 5)

NEW REGULATIONS

FCC Turns to Spectrum Auctions to Select Wireless Licensees

As required by the Omnibus Budget Reconciliation Act of 1993, the Federal Communications Commission (FCC) is about to breathe new life into the time-honored tradition of the public auction. Up for bids will be America's hottest new commodity, the electromagnetic spectrum. The first auctions will be held on July 24-29, 1994.

In a Report and Order released in April, 1994, the FCC established the general framework for conducting auctions of a wide variety of exclusive licenses for wireless services. Included, for instance, are licenses for Personal Communications Services (PCSs) -- both broadband and narrowband. Also included are licenses for video distribution in the Multichannel Multipoint Distribution Service (in other words, wireless cable). Even the buzzword of the 1990's -- "interactivity" -- is represented by licenses that will be available in the Interactive Video and Data Service (IVDS).

Although they are diverse in nature, these licenses have one essential feature in common: they will authorize the wireless provision of communications services to subscribers for compensation.

Potential providers of commercial wireless services will now be required to master the meaning of terms like "sequencing" and "simultaneous multiple round bidding," which are about to enter the FCC's glossary of terms that describe auction design features. For each wireless service, the FCC will select the auction design that it believes best fits the nature of the licenses being auctioned.

For example, the early rounds of auctions will cover 1,468 IVDS licenses and 3,554 narrowband PCS licenses. For IVDS licenses, the FCC has elected to use oral bidding to auction the licenses for large population

areas and single round sealed bidding for smaller population areas. For narrowband PCS licenses, the FCC has elected to employ simultaneous multiple round bidding as its auction design, although it left open the option to use simpler bidding methods should the operational complexity or administrative costs associated with simultaneous multiple round bidding prove to be excessive relative to the value of the narrowband licenses.

Regardless of the nature of the licenses being auctioned or the auction design being employed, there are safeguards against and penalties for abusive practices. For instance, all participants will be required to make substantial upfront payments as a condition of bidding. Winning bidders will be required to supplement their upfront payments five days after the close of the auction with an amount sufficient to bring their total deposit up to at least 20% of their winning bids.

If the high bid is withdrawn or the bidder is disqualified during the course of the auction, the bidder will be required to forfeit the difference between the amount of its bid and the amount the license actually brings in the auction, unless the amount at auction exceeds the withdrawn bid. If the bid is withdrawn after the close of the auction, an additional penalty of 3% of the actual amount received by the government for the license will be added to the amount owed by the withdrawing bidder.

In general, auction winners will be required to make full payment of their entire bid within five business days following award of the license. After the license is awarded, there are buildout requirements and restrictions against premature sale of the communications property. ♦

"Although they are diverse in nature, these licenses have one essential feature in common: they will authorize the wireless provision of communications services to subscribers for compensation."

STRATEGY

Near Term Business Opportunities in PCS

PCSs (Personal Communications Services) come in two varieties: narrowband and broadband. Although these designations refer to the amount of electromagnetic spectrum that the license authorizes the service provider to use, another way to think of the two types of PCS systems is near term and far term.

Most industry observers believe that broadband PCS systems will not be a marketplace reality until 1997 at the earliest. The same is not true, however, of narrowband PCS. Narrowband PCS systems will operate on spectrum bands in the 900 MHz (megahertz) region where there are no prior existing licensees. Thus, unlike the 2 GHz (gigahertz) band where broadband systems will operate, there will be no transition period for the reaccommodation of existing licensees.

Moreover, the FCC (Federal Communications Commission) has adopted the final licensing configuration for narrowband PCS, whereas the FCC is reconsidering the licensing structure for broadband PCS. The bidding is expected to begin for narrowband PCS licenses in the summer of 1994, whereas no one is quite sure when the bidding for broadband PCS licenses will begin.

Narrowband PCS is much more limited in scope than broadband PCS. Narrowband PCS is essentially an advanced form of paging, including voice paging, acknowledgement paging, data messaging and two-way messaging. Although narrowband PCS may not be as robust as broadband PCS promises to be, neither is the necessary infrastructure investment as great.

Narrowband PCS will be the next step in the evolution of the paging industry. The advanced features of narrowband PCS paging systems will represent the state of the art. The licenses will be available to existing paging entities as well as to new entrants into the industry.

The FCC's licensing scheme will accommodate nearly any business plan. For instance, there will be 2 licenses available in every Basic Trading Area, which is roughly the size of a city. For companies that desire to serve a Major Trading Area (roughly the size of a state), there will be 7 licenses available. If a company wanted to serve a Region (roughly 20% of the U.S. population),

there are 6 licenses available. Companies that desire to serve the entire country can bid on 10 available licenses.

The FCC estimates that a license to serve a BTA in a rural area may be won for as little as \$5,000. Businesses owned by women or minorities will receive a 25% bidding credit in order to boost their chances of winning a license. All bidders will be required to deposit a certain amount of cash prior to the auctions. The minimum deposit will be \$1,000. While most winning bidders will be required to pay the balance of their bid almost immediately, small business applicants will be able to pay for their licenses in installments over the first license term.

Narrowband PCS bears hardly any resemblance to its broadband cousin. It is, however, a realistic and practical advance in the art of personal communications and well worth the consideration of communications entrepreneurs. ♦

("Mobility," continued from page 3)

was \$98 and industry revenues were about \$2 billion. By 1992, there were over 11 million units in use and industry revenues were about \$8 billion, despite the fact that a subscriber's average monthly bill had fallen to \$69. At the present time, approximately 7% of the population uses cellular telephones. Projections are that over 20% of the population will be using cellular telephones ten years from now.

While cellular telephones are often referred to as "car phones," the fastest growing segment of the cellular telephone hardware market is small, battery-powered units that can be carried in a pocket, purse or briefcase. It is no longer unusual to see people walking down the street and talking on the telephone. The trend is clear: there is a market for mobility. ♦

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Yes! We want to know more about the issues discussed in the Spring/Summer 1994 issue of the Telecommunications Advisory.

We are especially interested in:

- ☐ Negotiating the relocation of our 2 GHz microwave system
- ☐ Bidding for a narrowband PCS license
- ☐ Keeping up with broadband PCS developments
- ☐ Other: _____

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Telecommunications Advisory

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INSIGHT AND COMMENTARY

FEATURE STORY

What are "Comparable Facilities?"

In this issue:

What are "Comparable Facilities?"

PCS licensees must replace incumbent microwave systems with "comparable facilities." Determining comparability will be a major aspect of negotiation between these parties.

(FEATURE STORY)

FCC Spectrum Auctions

FCC licenses now go to the highest bidders - the auction results so far.

(PAGE 2)

FCC Reorganization Reflects New Wireless Industry

As wireless technologies converge, so do regulatory structures.

(PAGE 3)

PCS Interests Seek FCC Endorsement of Cost Sharing

As the negotiations draw near, the parties jockey for position.

(PAGE 4)

By now, most incumbent microwave licensees probably have read thousands -- perhaps *tens* of thousands -- of words describing the Federal Communications Commission's (FCC's) decision to implement Personal Communications Service (PCS) in the 2 GHz (gigaHertz) band occupied by Operational Fixed Microwave Service licensees. Of all of those words, two are the most important: "comparable facilities."

Although microwave users operating in the 2 GHz band can be forced to make way for PCS, they have a right to insist that the PCS licensee provide and pay for "comparable facilities" elsewhere in the spectrum. Replacement bands, to accommodate the displaced microwave users, were designated by the FCC at 1.7, 4, 5, 6 and 10 GHz.

The FCC set forth an elaborate negotiation framework to facilitate the exodus of microwave users to these new frequencies. A two year "voluntary" period of negotiation was established for PCS licensees and incumbent microwave users to reach their own mutually satisfactory arrangements.

If the relocation problem is not resolved voluntarily, a one year "mandatory" negotiation period was set by the FCC. During this period, PCS licensees and micro-

wave users are required to negotiate in "good faith." If these mandatory, good faith negotiations are unsuccessful, the FCC will "involuntarily" relocate microwave users to other bands.

Under any involuntary relocation plan, the FCC will require the PCS licensee to pay all costs of relocating the microwave licensee to "comparable facilities." But what does the phrase "comparable facilities" actually mean? Must all facilities be replaced? Must all links be changed-out? Must the previous system's reliability level be maintained?

At this point, no one knows with absolute certainty the answers to these and other similar questions. Not the PCS applicant. Not the fixed microwave licensee. Not the FCC.

All anyone knows for sure is that "comparable facilities" must be "equal or superior to" the microwave licensee's existing facilities, according to the FCC. This, of course, is an extremely broad standard. It leaves a great deal of room for debate and negotiation.

For instance, PCS licensees may argue that spectrum is largely fungible; that 10 GHz is comparable to 2 GHz; that only 5 local links in a 50 link, multistate system

(continued on page 2)

COMPARABLE FACILITIES

(continued from page 1)

need be changed-out; that microwave reliability percentages are unnecessarily high; and that not all "i's" need be dotted and "t's" crossed in order for relocated systems to be "comparable" to the original 2 GHz systems. Microwave licensees, on the other hand, may well argue just the opposite.

At a minimum, the concept of "comparable facilities" was intended by the FCC to function as a safety net. If, within one year after the relocation, a fixed microwave licensee can demonstrate to the FCC that the new facilities are in fact not "comparable" to the previous facilities, the PCS licensee will be required to remedy the defects or to pay (again) for the relocation of the microwave licensee's facilities back to 2 GHz or to some other equivalent spectrum. In short, if the new facilities don't "work" at a comparable level, the PCS licensee will be required to fix the problem or to return the microwave licensee to the status quo ante.

As a practical matter, the concept of "comparable facilities" probably will not be fully clarified until the relocation process itself creates an industry standard. Once there is a proven track record, developed on a case-by-case basis, PCS licensees and microwave users will have some benchmarks to determine when facilities may be deemed "comparable." Until then, the definition of "comparable facilities," like beauty, will remain largely in the eye of the beholder. ♦

"COMPARABLE FACILITIES?"



(What does it actually mean?)

FINANCIAL

FCC Spectrum Auctions

The auction for so-called "broadband" PCS licenses will begin on December 5, 1994, and may run for several weeks. However, by the time this auction is held, the FCC will have held three previous spectrum auctions.

The first two auctions were held in July, 1994. They brought in \$831 million for the U.S. Treasury -- an amount far in excess of anyone's preauction predictions. In October, 1994, the FCC began its third spectrum auction, this time for so-called "narrowband" PCS licenses, which can be used to provide advanced paging and messaging services.

The FCC's fourth spectrum auction will be for the "crown jewels" -- two 30 MHz (megaHertz) blocks of broadband PCS spectrum in each of the country's 51 Major Trading Areas (MTAs). However, 99 licenses (not 102) are being offered at auction since the FCC has already awarded three licenses through its pioneers preference program. The bidding on these licenses is expected to mount into the *billions* of dollars and a slew of communications giants have formed alliances to amass sufficient capital for successful bids.

The dates for other auctions have yet to be set. The FCC anticipates

auctioning "Entrepreneur Block" broadband PCS spectrum in early 1995. One 30 MHz block and one 10 MHz block will be available in each of the nation's 493 Basic Trading Areas (BTAs).

Only entities with annual gross revenues of less than \$125 million and total assets of less than \$500 million will be eligible to bid for Entrepreneur Block licenses. No single company may obtain more than 98 of the licenses (10 percent) on the Entrepreneur Blocks. Further, small businesses (less than \$40 million in revenues) will receive a 10 percent bidding credit. Businesses owned by women and/or minorities will receive a 15 percent bidding credit. Since bidding credits are cumulative, a small business owned by women and/or minorities will receive a 25 percent bidding credit.

Later in 1995, the FCC is expected to auction off two 10 MHz blocks of broadband PCS spectrum in each of the 493 BTAs. This auction will be followed by auctions of 800 and 900 MHz wide-area SMR (specialized mobile radio) licenses. Clearly the continuing saga of spectrum auctions will dominate the communications news for the foreseeable future. ♦

For further information contact the editor:

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TECHNOLOGY

FCC Reorganization Reflects New Wireless Industry

On August 1, 1994, the Federal Communications Commission (FCC) announced a major reorganization. Reorganizations are nothing new for the FCC. In April, 1994, for instance, the FCC carved a new Cable Services Bureau out of its Mass Media Bureau, in order to handle the enormous rate regulation burden laid on the agency by the *Cable Television Consumer Protection and Competition Act of 1992*.

The August reorganization, which merged the Private Radio Bureau into portions of the Common Carrier Bureau to form a new Wireless Telecommunications Bureau, was only partially driven by new legislation. Certainly the *Omnibus Budget Reconciliation Act of 1993* mandated equality of regulation for all commercial mobile radio services, which is clearly easier to accomplish if all of these services are regulated in one bureau. However, this reorganization was driven by the ongoing blurring of previously distinct industry segments --- a phenomenon which goes by the name "convergence."

Convergence is the result of the constant changes that are occurring in such diverse areas as wireless networks; intelligence in the infrastructure; device miniaturization; battery technology; digitization; and even shifting lifestyles. Former stand-alone technologies are combining with each other to form hybrid technologies. The result is a new family of multifunction, multi-feature devices that, more often than not, are battery-operated, portable and useful for a wide variety of business and personal communications.

Take pagers and telephones, for example. Formerly you wore a pager on your belt and when it beeped, you went to a pay phone to call a particular number. Today you carry a lightweight portable cellular telephone in your pocket or purse. When it rings, you talk to the caller immediately. Moreover, the call may be from a business

becoming irrelevant concepts, as the "virtual office," a world of voice mail, e-mail and remote uploading and downloading, becomes the norm. Many contemporary workers simply carry their computer, fax machine, telephone and pager with them. Sometimes, what they are carrying is only one device. They can communicate wherever they are, no matter the time of day.

This wireless revolution has made obsolete many tenets of communications regulation. Recently, in adopting harmonized regulations to govern commercial wireless services, regardless of their historical origins in the private radio or common carrier industries, the FCC acknowledged that "growth in the wireless marketplace is bringing with it an increasing degree of service convergence."

It no longer makes sense to classify wireless devices according to whether they are used for business or personal communications. Neither does it make sense to preserve a regulatory structure based on such distinctions. The creation of a Wireless Telecommunications Bureau was inevitable. ♦

"Convergence is the result of the constant changes that are occurring in such diverse areas as wireless networks; intelligence in the infrastructure; device miniaturization; battery technology; digitization; and even shifting lifestyles."

associate, telling you the deal has been completed, or from the nurse at your child's school, telling you that your child has become ill and needs to be taken home.

Today's wireless technologies cater to the needs of people on the go, who have friends and business contacts in different time zones and even on different continents. For many people, the 8-hour work day and the downtown workplace are



(The communications tool of the '90s: a notebook computer equipped with a wireless modem.)

RULEMAKING

PCS Interests Seek FCC Endorsement of Cost Sharing

The Personal Communications Industry Association (PCIA) is attempting to garner the backing of the Federal Communications Commission (FCC) for a proposal that could force incumbent microwave licensees to negotiate their 2 GHz (gigaHertz) relocation terms with a group of Personal Communications Service (PCS) licensees, rather than one-on-one. Although PCIA's efforts have met an initial set-back, the FCC has all but invited the association to try again.

In a petition for reconsideration filed in General Docket No. 90-314, PCIA had asked the FCC to adopt rules requiring PCS licensees to participate in cost sharing for the relocation of incumbent microwave links. Its argument was that incumbent point-to-point microwave systems could cut across geographic service areas that had been licensed to different PCS service providers. It also argued that the frequencies used by the incumbent microwave systems did not always fall within the discrete spectrum blocks awarded to PCS licensees.

PCIA therefore sought to require a cost sharing plan among all PCS licensees who might stand to benefit from the relocation of any particular microwave incumbent. PCIA argued that an industry cost sharing plan was needed to "ensure fair and equitable funding of microwave link relocations."

In opposing the PCIA proposal, incumbent microwave licensees took note of the fact that PCIA's proposal had excluded the sharing of expenses for "premiums" paid for voluntary relocations, interest

payments, and payments in "excess of the costs required for providing the microwave licensee with comparable alternative facilities."

The FCC has rejected, at least for now, PCIA's proposal. On October 19, 1994, the FCC denied PCIA's petition. The FCC found PCIA's proposal, to have beneficiary PCS licensees pay a *pro rata* share of documented relocation costs, "an attractive idea in theory."

Keller and Heckman was founded as a telecommunications law firm in 1962. Since then, our practice has expanded in step with the industry's tremendous growth.

"PCS licensees are expected to regroup and file a more fully developed petition"

However, the FCC foresaw a morass of disputes that it might be the PCIA proposal. For example, the agency did not want to get involved in deciding the extent to which the respective PCS licensees might have benefitted from a particular incumbent's relocation.

Calling the PCIA proposal "not sufficiently developed to warrant adoption at this time," the FCC dismissed the petition "without prejudice," noting that PCIA and others are free to resubmit the proposal as a separate petition for rule making.

PCS licensees are expected to regroup and file a more fully developed petition, this time with built-in adjudication mechanisms that do not depend upon the FCC. ♦

We currently represent Fortune 500 companies, large utilities, common carriers, and governmental entities that operate extensive point-to-point microwave systems in the 2 GHz band. Building on that knowledge, we have identified the most critical issues which incumbents must address in relocation negotiations and would be pleased to review those issues with you at any time.

THE TELECOMMUNICATIONS PRACTICE GROUP

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